

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

RODERICK LOUIS PIPPEN
Defendant-Appellant

_____ /

WAYNE COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee

KATHERINE L. MARCUZ (P76625)
Attorney for Defendant-Appellant

Supreme Court No. 161723

Court of Appeals No. 347729

Lower Court No. 10-6891-01 FC

Defendant-Appellant's Reply Brief

STATE APPELLATE DEFENDER OFFICE

BY: Katherine L. Marcuz (P76625)
Managing Attorney
3031 West Grand Blvd.
Suite #450
Detroit, Michigan 48202
(313) 256-9833
kmarcuz@sado.org

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Reply

I. *People v Clark* is not controlling authority for the prosecutor's proposition that *People v Johnson* has no bearing on a trial court's credibility determination when assessing prejudice in the ineffective assistance of counsel context.

The prosecutor argues that the credibility analysis established in *People v Johnson*, 502 Mich 541 (2018) does not apply to questions of prejudice in the ineffective assistance of counsel context. Appellee's Brief at 33. In support of that position, the prosecutor relies on this Court's order in *People v Clark*, 488 Mich 875 (2010), which reversed the Court of Appeals opinion granting the defendant a new trial on the basis of ineffective assistance of counsel "for the reasons stated in the Court of Appeals dissenting opinion."¹ Appellee's Brief at 33-34; Appellee's Appendix 18b.

Whether this Court's order in *Clark* is binding precedent or not, it has no bearing here. Foremost, neither the dissenting opinion, nor this Court's order addressed the application of *Johnson*; *Johnson* was decided eight years after *Clark*. More importantly, however, the dissenting opinion in *Clark* is not at odds with *Johnson*. The *Johnson* Court did not find, and Mr. Pippen has never argued, that only a jury may assess the credibility of witnesses. Nor does *Johnson* hold that "each time a defendant presents a witness at a *Ginther* hearing that was not called at trial—no matter how incredible they might be—a new trial would be necessary, because the jury would need to assess the credibility of that witness." Appellee's Brief at 34, citing *People v Clark*,

¹ The dissenting opinion provided multiple reasons for why it would have affirmed the trial court's decision. Its principal reason was that the new witness' testimony contradicted the complainant on a point that was not material, and which could be explained by the complainant's age. This is not the same as what occurred in this case, where the trial judge discounted the testimony of the new witness based on its view of that witness' credibility.

unpublished opinion per curiam of the Court of Appeals, decided June 1, 2010 (Docket No. 285438) (dissenting opinion) (Appellee's Appendix 16b-17b).

Johnson expressly states that the trial judge *does* have a role in assessing credibility, but that role is limited. 502 Mich at 566–567. First, the court must determine whether “a reasonable juror could” find the new evidence credible. If a witness is not patently incredible, the court must determine whether, in conjunction with the rest of the record, the new evidence creates a reasonable probability of a different outcome upon retrial. *Id.* at 570–572. In other words, if, as the dissenting judge in *Clark* proposed, a witness is so incredible that no reasonable juror could find the testimony credible on retrial, the trial court may deny the motion on that basis. *Id.* at 566-567. If not, the court must consider the new evidence against the evidence presented at trial.²

II. The *Johnson* test for assessing witness credibility applies in the context of a *Strickland* analysis.

Other than asserting that *Clark* controls, the prosecution's supplemental brief provides no explanation for why this Court's holding in *Johnson* should not apply when the resolution of an ineffective assistance of counsel claim involves witness credibility. In contrast, Mr. Pippen offers several reasons why the *Johnson* Court's holding concerning the role of the trial court in assessing credibility should apply equally in the ineffective assistance of counsel context.

First, though *Johnson* directly concerned the trial court's role when making credibility determinations in assessing a newly discovered evidence claim, this Court

² Notably, the dissenting judge in *Clark* did this analysis and concluded that the new evidence would not have seriously impacted the credibility of the victim given the other evidence. Appellee's Appendix 15b-16b.

considered other contexts in which the trial court's function is similarly limited because it is not the ultimate fact finder. *Id.* at 567-568, citing *People v Anderson*, 501 Mich 175 (2018). Like preliminary examinations and motions for relief from judgment, "a trial court similarly plays a preliminary gatekeeping role" in assessing a defendant's motion for new trial on ineffective assistance of counsel grounds. *Id.*

Second, while different legal claims, the tests for ineffective assistance of counsel and newly-discovered evidence employ the same prejudice standard: the defendant must show a reasonable probability of a different outcome. See *Strickland v Washington*, 466 US 668, 694 (1984); see *Johnson*, 502 Mich at 577, citing *People v Tyner*, 497 Mich 1001 (2003). Further, in *Johnson*, this Court looked to ineffective assistance of counsel cases in order to assess the materiality of the new evidence in the case before them. It stated that ineffective assistance of counsel cases are instructive in assessing prejudice in the newly-discovered evidence context because *Strickland*, like *Cress*³, requires the reviewing court to assess the totality of the evidence to determine whether the "new evidence or ineffective assistance" calls into question the validity of a prior conviction. 502 Mich at 576 n 16.

Finally, claims of ineffective assistance of counsel are constitutional claims guaranteed by the Sixth Amendment to the United States Constitution. It makes little sense that this Court would provide more protection for criminal defendants who present newly-discovered evidence, than those whose convictions are unreliable because of a breakdown in the adversarial process that our system counts on to produce just

³ *People v Cress*, 468 Mich 678, 692 (2003); see also *People v Grissom*, 492 Mich 296, 321 (2012) (ordering "the trial court [on remand to] carefully consider the newly discovered evidence in light of the evidence presented at trial").

results. *Strickland*, 466 US at 696. If anything, the standard for evaluating ineffective assistance of counsel claims should be more protective than the newly discovered evidence standard. In *Strickland*, the Court explained:

Even when the specified attorney error results in the omission of certain evidence, the newly discovered evidence standard is not an apt source from which to draw a prejudice standard for ineffectiveness claims. The high standard for newly discovered evidence claims presupposes that all the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result is challenged. Cf. *United States v Johnson*, 327 US 106, 112 (1946). An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower.

Id. at 693-694 (cleaned up).

There is no reason why the trial court should have a more unrestricted role in assessing witness credibility where an attorney's deficient performance has resulted in the omission of certain evidence than where new evidence was discovered after a presumptively accurate and fair proceeding. The court's role with respect to assessing credibility is as a gatekeeper—it should not stand in the place of the jury. See *Ramonez v Berghuis*, 490 F3d 482, 490 (CA 6, 2007); *Matthews v Abramajtys*, 319 F3d 780, 790 (CA 6, 2003); *Barker v Yukins*, 199 F3d 867, 874–75 (CA 6, 1999).

III. The trial court did not conduct the proper credibility analysis under *Johnson*. If it had, it would have found that Mr. Hudson is not patently incredible.

Contrary to the prosecutor's contention, the trial court did not conduct the proper credibility analysis under *Johnson*. See Appellee's Brief at 35. The court neither cited *Johnson*, nor acknowledged its limited function in determining whether the new evidence was credible. Furthermore, in assessing Mr. Hudson's credibility, the trial

court did not “consider all relevant factors tending to either bolster or diminish the veracity of the witness’s testimony.” *Johnson*, 502 Mich at 567.

The issues the prosecutor asserts undermine Mr. Hudson’s credibility—his ten-year old theft convictions, friendship with Mr. Pippen, and testimony that he did not personally see Mr. Pippen kick a gun under a car (though he acknowledged it happened)—are appropriate considerations for a jury at a new trial. As discussed at length in Mr. Pippen’s supplemental brief (see pages 18-22), these issues did not render Mr. Hudson patently incredible and cannot justify wholly disregarding his testimony.

After making no effort to interview (657a), let alone prosecute Mr. Hudson, the prosecution asserts on appeal that he was an accomplice to the crime. Appellee’s Brief at 42. Nonetheless, Mr. Hudson spoke to an investigator prior to Mr. Pippen’s trial (647a), was willing to testify at that trial (648a), and testified at the *Ginther* hearing, despite some personal risk (665a-666a). When asked why he was willing to testify, Mr. Hudson responded, “[b]ecause I know what Shawn [sic] McDuffie had told them is a lie, and even though I’m not charged or didn’t have nothing to do with it, it’s just crazy for me to just sit up here and not tell them that this is a lie.” 665a. When considering Mr. Hudson’s testimony in its entirety, it is clear that his testimony is not wholly incredible, and that a reasonable juror could find his testimony worthy of belief on retrial.

IV. The prosecution argues for the first time on appeal that a “reasonable probability of a different result” means a reasonable probability that no juror would have convicted Mr. Pippen but for counsel’s errors. This argument is abandoned and without merit.

For the first time in its supplemental brief before this Court, the prosecution asserts that the “lone juror standard” “should not apply to claims of ineffective assistance of counsel under *Strickland*, inasmuch as that standard would actually be in

conflict with *Strickland*.” Appellee’s Brief at 37. According to the prosecutor, *Strickland*’s prejudice standard cannot be satisfied by anything less than an acquittal, so the defendant “has the burden of showing that there is a reasonable probability that no juror would have found him or her guilty” but for counsel’s errors. *Id.* at 39.

These arguments, made for the first time now, over six years after the original motion for new trial and *Ginther* hearing in this case, are abandoned. This Court has repeatedly held that when a matter is not properly raised before this Court, the Court will not consider it. See, e.g., *People v Ford*, 417 Mich 66, 105–106 (1982); *People v Oliver*, 417 Mich 366 (1983); *People v McKinley*, 496 Mich 410 (2014). The Court should find, as it did in *People v Walker*, 504 Mich 267, 276 n 3 (2019), that the prosecution has abandoned these arguments by raising them for the first time now.

Even if it was not abandoned, the prosecutor’s position is completely contrary to *Strickland*. The *Strickland* Court held, “[w]hen a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.” 466 US at 695. Said differently, to establish prejudice, “the defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* And, as discussed *supra*, *Strickland* explicitly rejected a “more likely than not” standard. *Id.* at 693. The “no reasonable juror” standard that the prosecutor proposes is unquestionably higher than “more likely than not.” See *Abramajtys*, 319 F 3d at 790 (emphasizing that a reasonable probability is less than “a certainty, or even a preponderant likelihood of a different outcome, nor even more, that no rational juror could constitutionally find [the defendant] guilty.”)

Adoption of the prosecutor’s proposed reading of prejudice under *Strickland* would essentially require the defendant to prove his innocence. Plainly, this is not what *Strickland* requires. Compare *Schlup v Delo*, 513 US 298 (1995) (individuals asserting innocence as a gateway to procedurally defaulted claims on federal habeas review must establish that, in light of new evidence, “it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.”).⁴

In support of its position, the prosecutor cites a habeas case out of the Tenth Circuit, *Hobdy v Raemisch*, 916 F3d 863 (CA 10, 2019), which concluded that the state court decision, which focused on the probability of acquittal, was neither contrary to nor an unreasonable application of *Strickland*, and *State v Chase*, 135 NH 209 (1991), a decision of the New Hampshire Supreme Court. Appellee’s Brief at 37-38. Neither decision is binding precedent nor persuasive authority.

Hobdy v Raemisch is inapplicable because, in reviewing an ineffective assistance of counsel claim under AEDPA, “a state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself.” *Harrington v Richter*, 562 US 86, 101 (2011). And in *State v Chase*, the New Hampshire Supreme Court mistakenly relied on the United State Supreme Court’s use of the word “verdict” in *Kimmelman v Morrison*, 477 US 365, 375 (1986) to conclude that a defendant must demonstrate a reasonable probability that he would have been acquitted to show prejudice under *Strickland*. *Chase*, 135 NH at 212-213; Appellee’s Brief at 38. *Kimmelman* held that the defendant must show “there is a reasonable

⁴ The “actual innocence” standard requires “a stronger showing than that needed to establish prejudice” in an ineffective-assistance-of-counsel claim. *Schlup*, 513 US at 327 & n 45.

probability that the verdict would have been different . . . in order to demonstrate actual prejudice.” 477 US at 375. However, the *Kimmelman* Court likely referred to the “verdict” because the defendant was convicted following a bench trial, so the only possible outcome was a guilty or not guilty verdict. *Id.* at 368. Even assuming these opinions are relevant or persuasive regarding the proper interpretation of “the result of the proceeding,” *Strickland*, 466 US at 695, they do not come close to endorsing the prejudice standard the prosecutor proposes.

Mr. Pippen submits that *Strickland* does establish a “lone juror standard” but it is not the test nor the low bar to relief the prosecutor conceives it to be. As an initial matter, a reviewing court’s analysis of whether counsel’s errors impacted the result of the proceeding is an objective inquiry. *Strickland*, 466 US at 695 (the prejudice inquiry “should not depend on the idiosyncracies of the particular decisionmaker”). Courts do not question the jurors who delivered a guilty verdict about how their deliberation and decision might have been different but for counsel’s errors. Nor do they afford deference to the trier of fact’s subjective opinion as to whether new evidence would have affected its original verdict. See *People v Dendel*, 481 Mich 113, 132 n 17, amended 481 Mich 750 (2008) (“the test for prejudice is an objective test and appellate courts should not simply defer to the trial court’s judgment regarding prejudice, even if the trial court was the fact-finder at the original trial.”). This objective inquiry requires reviewing courts to presume “that the judge or jury acted according to law.” *Strickland*, 466 US at 694. As *Strickland* instructs, “the assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision.” *Id.* In short, “the possibility of

arbitrariness, whimsy, caprice, ‘nullification,’ and the like” must be excluded from the prejudice analysis. *Id.* at 695.

Given the objective prejudice inquiry *Strickland* requires and the nature of the American jury system, a reasonable “factfinder” or “decisionmaker” is a proxy for a reasonable jury. If a court concludes that a single hypothetical rational juror would have voted to acquit but for counsel’s errors, it must also assume that there is a reasonable probability a hypothetical rational jury would have acquitted. *Strickland*, 466 US at 694 (“A reasonable probability is a probability sufficient to undermine confidence in the outcome.”). The prosecutor’s proposed test for prejudice (the defendant “has the burden of showing that there is a reasonable probability that no juror would have found him or her guilty” but for counsel’s errors) illustrates why any other formulation of “reasonable probability of a different result” creates a higher standard than *Strickland* allows.

In sum, to obtain relief, Mr. Pippen does not need to demonstrate that no reasonable juror would have found him guilty. Rather, he need only establish a reasonable probability that the result of his jury trial would have been different. See *People v Carbin*, 463 Mich 590, 600 (2001). This determination hinges not on “whether the defendant would have been more likely than not to have received a different verdict, but whether he received a fair trial in the absence of the evidence, i.e., a trial resulting in a verdict worthy of confidence.” *People v Fink*, 456 Mich 449, 454 (1998).

V. The trial court erred in failing to consider the totality of the evidence as required by *Strickland*.

Even if this Court were to disagree that a trial court’s credibility determination when assessing prejudice in the ineffective assistance of counsel context is concerned

with whether a reasonable juror could find the testimony credible on retrial, Mr. Pippen is entitled to a new trial. The trial court failed to properly assess the effect of Mr. Hudson's testimony in conjunction with the evidence that was presented at trial as it was required to do. The correct analysis would have concluded that counsel's failure to call Mr. Hudson as a witness prejudiced Mr. Pippen.

In their supplemental brief the prosecution, like the trial court, downplayed the problems with Mr. McDuffie's testimony about the crime itself and completely ignored the fact that Mr. McDuffie was an incentivized witness who, by his own account, was threatened with perjury charges before the preliminary exam, and had to be brought to trial on a material witness warrant. The prosecutor's efforts to depict Mr. McDuffie as a reliable witness by highlighting his testimony that was "consistent with the facts" only underscores the problem. Appellee's Brief at 45-46. Mr. McDuffie's testimony was inconsistent with the facts about as often as it was consistent. The prosecutor, like the trial court, also ignored the central role Mr. Hudson played (in absentia) in the prosecution's case. When considered against all the evidence presented at trial, the impact of Mr. Hudson's potential testimony on the result of the trial cannot be underestimated.

Mr. Pippen made the showing required to obtain a new trial under the *Strickland* standard, but the trial court failed to engage in a proper holistic review, which entails weighing all the evidence in the record, favorable and unfavorable. Its denial of relief on this basis constituted an abuse of discretion. A new trial is required.

Summary and Relief

Mr. Roderick Pippen asks this Honorable Court to grant leave to appeal and reverse his convictions, or any appropriate peremptory relief.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

/s/ Katherine L. Marcuz

BY: _____

Katherine L. Marcuz (P76625)

Managing Attorney

3031 W. Grand Blvd., Suite 450

Detroit, Michigan 48202

(313) 256-9833

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